(2)

Supreme Court, U.S.
FILED
MAY 12 1992
OFFICE OF THE CLERK

No. 91-1687

In The
Supreme Court of the United States

October Term, 1991

WILLIAM D. BLANKINSHIP and
WILLIAM GREGORY BLANKINSHIP

Petitioners,

vs.

CINCO ENTERPRISES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT CERTIORARI TO THE COURT OF APPEALS AFTER DISCRETIONARY DENIAL OF REVIEW BY THE SUPREME COURT OF THE STATE OF OKLAHOMA

Lowell T. Sawyer
Counsel of Record
P.O. Box 3247
Enid, Oklahoma 73702
(405) 233-4455

STA22/cinco-02

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	2
STATEMENT OF CASE	3-4
ARGUMENT	5-10
I. The "Questions Presented" By Petitioners Were Not Dispositive Issues In The Trial Court Or Oklahoma Appellate Courts	5
A. Malicious Prosecution .	5
B. Probable Cause	7
APPENDIX	A-1
Statutes Involved	A-1-A-2

TABLE OF AUTHORITIES

Page

CASES

Glasgow v. Fox, 757 P.2d 836 (Okla. 1988). 5

Young v. First State Bank, Watonga, 628 P.2d 707 (Okla. 1981). . . 7

STATUTES

OKLA.STAT.tit. 12A, §§3-301 and 3-306 (1981) . . . 8, A-1, A-2

STATEMENT OF THE CASE

1. On March 17, 1987, respondent purchased a group of notes from the FDIC who was Receiver of the failed Norman Bank of Commerce.

2. One of the notes purchased by respondent was a note made by petitioners, William D. Blankinship and William Gregory Blankinship.

3. In April, 1988, respondent filed suit against the petitioners to collect on the note.

4. In June, 1988, petitioners filed an answer and counterclaim. The counterclaim was based on malicious prosecution, want of probable cause, malice, negligence, attempted extortion, bad faith, abuse of process and punitive damages.

5. On September 26, 1988, respondent dismissed without prejudice

its cause of action against the petitioners on the note.

6. On February 10, 1989, respondent moved for summary judgment against petitioners on their counterclaim.

7. On March 27, 1989, the trial court granted respondent's Motion for Summary Judgment against the petitioners.

8. The respondent's Motion for Summary Judgment, the trial court's order granting summary judgment and the Oklahoma Court of Appeals' decision never addressed the respondent's status as holder or holder in due course. There was also no finding on the privileges and immunities of the FDIC which passed to respondent when it purchased the note.

ARGUMENT

I. The "Questions Presented" By Petitioners Were Not Dispositive Issues In The Trial Court Or Oklahoma Appellate Courts.

The trial court and Oklahoma Appellate Courts decided issues which are solely state law issues. The trial court was requested to determine: 1. whether respondent had maliciously prosecuted the petitioners; and 2. whether respondent, in bringing its action against petitioners, had acted with probable cause.

A. Malicious Prosecution.

The Oklahoma Supreme Court has held that an action for malicious prosecution cannot be based upon the termination of an action by a voluntary dismissal without prejudice. *Glasgow v. Fox*, 757 P.2d 836 (Okla. 1988).

The dispositive issue on petitioners' malicious prosecution cause of action was based on the fact that respondent had dismissed its action without prejudice. Thus, petitioners' cause of action failed. The Oklahoma Courts' decisions were not based upon what status respondent occupied when it sued petitioners on the note.

Regardless of whether the Oklahoma Courts determined respondent had the status of holder or the status of holder in due course, the decisions would remain unchanged.

The Oklahoma Courts have not decided a federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeals. The Oklahoma Courts have not decided an important question of federal law which

has not been, but should be, settled by this Court.

The Oklahoma Courts have made a state law determination as to what are the elements for a cause of action for malicious prosecution. No federal law question was dispositive of their decision. Certiorari is not appropriate.

B. Probable Cause.

The Oklahoma Supreme Court has held that a reasonable belief in the possibility that a claim may be valid is sufficient to give a party cause for instituting an action. *Young v. First State Bank, Watonga*, 628 P.2d 707 (Okla. 1981). The dispositive issue on petitioners' remaining theories in their counterclaim was whether respondent had probable cause to file the action

against petitioners on the note it purchased from the FDIC.

Both the Oklahoma Trial Court and Appeals Court determined that it was undisputed that petitioners had a reasonable belief in the possibility of the claim being valid. Again, the Oklahoma Courts' rulings were not based on the status occupied by the respondent after purchasing the note.

A holder of a note may enforce the instrument subject to defenses. OKLA.STAT.tit. 12A, §§3-301 and 3-306 (1981). The Oklahoma Uniform Commercial Code does not state that the holder of a note is barred from enforcing the note and only holders in due course have probable cause to bring an action.

Because respondent could enforce the note even if classified as a mere holder of the note, the only issue for the Oklahoma Courts was whether

respondent acted on probable cause. The dispositive issue was not holder or holder in due course status or what federal privileges were assigned to the respondent when it purchased the note from the FDIC, but rather probable cause to bring the action.

The case was decided on the uncontrovered fact that respondent had probable cause to institute its action against petitioners on a note. This is not a situation where the state court of last resort has decided a federal question in a way that conflicts with the decisions of another state court of last resort or of the United States court appeals. It is also not an action where a state court has decided an important question of federal law which has not been, but should be, settled by this Court.

Because the status of respondent or what privileges and immunities it obtained from the FDIC when it purchased the notes are not germane to the decision of the Oklahoma Courts and the state courts' decisions were based on state law, certiorari is inappropriate.

Respectfully submitted,

TRAYNOR, LONG & WYNNE, P.C.

By: _____

Lowell T. Sawyer
OBA No. 7928
Paul K. Woodward
OBA No. 11188
P.O. Box 3247
Enid, Oklahoma 73702
(405) 233-4455

Attorneys for Respondent

APPENDIX

STATUTES INVOLVED

OKLA.STAT.tit. 12A §3-301 (1981)

The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise provided in Section 3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

OKLA.STAT.tit. 12A §3-306 (1981)

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a

restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third party himself defends the action for such party.